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ABSTRACT

Employee Involvement Schemes (EIS) are modeled after Western European worker participation models. These are grounded in collaborative labor relations and encourage employees to participate in work place decision-making. If employees, as the term is defined in the National Labor Relations Act, take part in EIS decision-making processes, they may be adjudged managerial or supervisory and risk losing their status under collective bargaining. The Commission on the Future of Worker Management Relations (1993), also called the Dunlop Commission, recognizes the need for labor law reform. Recent National Labor Relations Board decisions have found "Action Committees" to be prohibited as unlawfully dominated labor organizations. There is ambiguity about the definition and status of the terms "managers" and "supervisors" as applied to professionals. Most of the EIS debate has concerned industrial settings. Empowerment projects have included professional employees who may also supervise others and thus their status is unclear. In college governance, the faculty senate may be viewed as a labor organization in so far as they deal with terms of employment. Academic unionists should not seek the end of these exclusions but should work to ensure that faculty are not deemed managerial or supervisory, based on their participation in institutional governance. Possible changes to the National Labor Relations Act to facilitate this are explained. (JLS)

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Joel M. Douglas[b]

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Joel M. Douglas[2]

THE FRAMEWORK

Structural solutions have been championed as a solution to the myriad problems confronting organized labor and the industrial relations community. These recommendations have stressed a dual thesis: 1) employees must become more productive and empowered in the work place and, 2) labor and management must end their adversarial relationship and become partners in the enterprise. To implement these suggestions reformers have urged the development of Employee Involvement Schemes (EIS) modeled after Western Europe worker participation models. Grounded in the collaborative labor relations model EIS are on the increase and in accordance with this approach employees are encouraged to participate in workplace decision-making and thereby have greater input and investment in their jobs.

Innumerable private sector EIS exist; yet, some observers caution that if "employees" as the term is customarily defined in labor law, take part in EIS joint decision-making processes they may be ultimately adjudged *managerial* or *supervisory* and risk losing "employee" status and associated collective bargaining rights.[3] Although the validity of the majority of EIS has not been litigated, some federal courts and administrative agencies have begun to examine collaborative EIS models and have sent mixed messages. It is doubtful that under the present legal framework that many EIS could withstand legal muster and be accommodated within American labor law. The creation of the "Commission on the Future of Worker Management Relations" in 1993 (The Dunlop Commission hereinafter "The Commission") by the Secretary of Labor and Secretary of Commerce is recognition of the need for labor law reform; however it also fueled the EIS debate.[4]

Recent NLRB decisions in Electromation, Inc.[5] and E.I. DuPont de Nemours & Company[6] in which workplace committee arrangements were struck down as violative of the National Labor Relations Act (hereinafter the "NLRA" or the "Act")[7] have moved the question of worker participation and cooperation beyond the theoretical realm. The National Labor Relations Board (hereinafter the "Board") found "Action Committees" at the nonunionized Electromation Company to be prohibited since they constituted unlawfully dominated labor organizations. In an appeal filed by the employer to the United States Circuit Court of Appeals for the Seventh Circuit, the Board's decision in Electromation was upheld.[8] While affirming, they noted that not all cooperative committees are illegal and there may be instances where the establishment of committees may not violate Section 8(a) (2) of the Act. In DuPont, referred to as "Electromation II," the NLRB held employer unilaterally promulgated safety committees at unionized facilities violative of Section 8(a) (2) and Section 5 of the Act.

TABLE OF CONTENTS

An Investigation of Employee Involvement Schemes and Governance Structures in Professional Employment 1
Professional Employees 2
Governance Structures 2
The Yeshiva Quandary 4
Recommendations and Conclusions 4

PROFESSIONAL EMPLOYEES

Varying degrees of ambiguity exist concerning the definition and application of the terms "managers" and "supervisors" as applied to professional employees under the Act. The present standards are a result of explanations set forth in the formative days of the Act and reflect a period when the American economy was primarily industrial and less service orientated. Today's workplace no longer reflects the artificial designation currently applied in labor law. Numerous employees have been given managerial and or supervisory titles without concomitant job responsibilities. Accordingly even legitimate accountability is widely distributed throughout the workplace. The question of professional employees and their "authority" has also been raised with the discussion focused on the source of such authority and whether it emanates from professional knowledge and expertise or from managerial or supervisory responsibilities. Also the decisions in Yeshiva and NLRB v. Health Care & Retirement Corp. of America have reinforced the rigid definitions of an earlier period.[9]

Although the EIS debate thus far has focused primarily on industrial America there is however a growing apprehension that this enigma may obstruct collective bargaining rights for professional employees including college faculty. Professional employees are defined in the Act and bargain pursuant to Section 2(12).[10] Section 9(b) (1) precludes professional and nonprofessional employees from being placed in the same bargaining unit unless the professional employees agree. A profusion of professional employees including physicians, attorneys, professors, engineers, teachers, nurses, musicians, engineers, pharmacists, social workers, and others bargain under these provisions. While many of these professional employees have embraced the empowerment model and have included both formal and informal EI programs in their workplace, they are also responsible for giving direction to other employees. Does the fact that professional employees may direct paralegals, teacher's assistants, licensed practical nurses, laboratory assistants, or other such employees jeopardize their own bargaining rights?

Collective Bargaining in higher education (hereinafter "CBHE") remains perhaps the only industry with a long history of co-existence between collective bargaining and worker cooperation and can be used as a model and point of departure for professional employees. It demonstrates a functional presentation of how a workplace behaves through a shared governance model. In academia there has existed a governance system akin to employee involvement schemes dealing with both faculty senates and certified faculty bargaining agents participating in the decision making process.[11] This paper focuses on EIS and college and university professors as professional employees under the Act and offers recommendations to the employee involvement and related managerial and supervisory question.

GOVERNANCE STRUCTURES

The distinguishing feature of college governance is arguably the faculty senate; accordingly one cannot assess the impact of Electromation and DuPont on CBHE without exploring the legal status of that body. Found at virtually every college and university, senates are institutionalized and traditionally have been the organizational mechanism by which collegial decisions, peer review, and shared governance are implemented. On unionized campuses faculty senates have addressed the pursuit of education and other academic matters, while the certified bargaining agent negotiates terms and conditions of employment. A widely recognized boundary exists between senates and unions and although there is sporadic overlap, their exclusive areas and spheres of interest are recognized. Other professions have joined to form associations akin to senates although not as institutionalized to govern their own professional and employment relationships and establish policy. These may include writers' guilds, engineers' councils, physicians' committees, and various employee congresses. Unlike bargaining agents, these bodies do not contemplate contractual relationships and were not created as "sham" unions or as a device to deny faculty representation rights under the Act.

This paper theorizes that some faculty senates may be labor organizations within the meaning of the Act in that they "deal" with the employer over certain conditions of employment. The fundamental issue addressed herein is:

> can the higher education dual governance model found on organized campuses serve as a prototype for the development of EIS for professional employees under the National Labor Relations Act or do the NLRB decisions in Electromation and DuPont threaten the existence of such bodies?

Also, the matter of continued faculty participation on committees analogous to the types referenced in Electromation and DuPont and whether that right is now jeopardized under the Act is also considered.

The NLRB has previously addressed the question of faculty governance and claims of unlawful domination

by administration or management over university committees. In NLRB v. Northeastern University, the Board held that the "Weekly Staff Cabinet" (WSC) was not management dominated even though the committee was established and funded by the university and met on the employee's time.[12] Further WSC appointments of faculty committee members were made by the university and WSC ballots were distributed with faculty paychecks. The Board found in Northeastern that despite the claim of employer domination, the WSC was based on employee motivation and indicated their choice of structure. In Duquesne University the Board held that even though the university as employer has the ability to influence committee organizational structure, unlawful domination is not found if said formulation and structure of the Action Committee is determined by faculty.[13]

Section 2(5) Indicia and "Labor Organizations"

Assuming the existence of a body of professional employees, what are the statutory criteria needed to prove the establishment of a "labor organization"? In Electromation, the Board reaffirmed a three part test to ascertain whether an EI committee qualifies as a "labor organization." The standards include: do employees take part in the organization and, if so, is "... the purpose of the organization, wholly or partially, ... to deal with the employer," and if so, does the, "... dealing between the organization and the employer involve terms and conditions of employment"?[14]

On the basis of these criteria some suggest that an argument could be made that college senates fall within the Section 2(5) definition of a labor organization. Employees participate in the faculty senate on both unionized and nonunionized campuses and "deal with" the employer over some conditions of employment. Since the intent of the Act was to fashion a broad definition of a labor organization, under that presumption, one can argue that faculty senates could qualify as labor organizations within the meaning of Section 2(5).

In DuPont distinctions were drawn by the Board between "dealing with" and "bargaining." "Dealing" is generally held to be a process more encompassing than "bargaining." However, the Board majority in DuPont noted that, "... dealing does not require that the two sides seek to compromise their difference." Committees that exist for the purpose of imparting information and sharing of information would not be deemed a labor organization. DuPont is instructive for it interpreted criteria first set forth in NLRB v. Cabot Carbon Co.[15] and reiterated in Electromation. For example, groups engaged in "brainstorming" and which did not make proposals were not found to be "dealing with" the employer. Additionally, under the Act, "sharing of information" with the employer was not considered "dealing." Applying these standards, faculty senates that discuss but do not formulate recommendations and present them to the administration might be so protected. Most committees and faculty senates are "consultative" in that they "recommend" with the final decision made by the president and/or Board of Trustees; however, senates that do not propose or advise might be viewed as ineffectual. Other DuPont criteria involved in ascertaining labor organization status includes the frequency of "dealing" whether it be on an ad hoc or regular basis and the existence of a management veto over the group's decisions.[16]

Section 8(a)(2) Indicia and "Unlawful Domination or Assistance"

In order for "unlawful domination" to be found the body must first qualify as a labor organization within the meaning of the Act. If that threshold is crossed then the unfair labor practice test under Section 8(a)(2) becomes one of unlawful domination or assistance. The indicia includes the employer's role in creating, forming, writing the bylaws and appointing members of the organization.[17] Superimposing the indicia of "unlawful domination or assistance" test upon an academic setting, the record supports the contention that many faculty senates receive free office space, material support, released time for the faculty presiding officer, some degree of clerical assistance, and/or other such benefits from the employer. In an industrial setting these acts may qualify as unlawful domination/support.

Conventional wisdom suggests that college administrators have not initiated Section 8(a)(2) claims against senates because neither administration nor faculty wishes to eliminate the senate. There is also the engrossing question of whether an employer can file a Section 8(a)(2) ULP charge against itself. However, if faculties are not employees protected by the NLRB as in Yeshiva then it seems unlikely that a college can pursue a Section 8(a)(2) claim against itself. Nevertheless, the opinion that college and university administrations can eliminate faculty senates still remains. If it can be demonstrated that the employer requires the employee to participate in an employer dominate organization, and if the faculty senate is deemed a labor organization, the faculty senate itself is illegal. Conversely, there are some faculty unionists who have suggested that removal of faculty senates through the Section 8(a)(2) route would open the door to widespread union organizing as bargaining and union representation become the only

vehicle whereby faculty can express collective action. If senates survive EIS challenges, then their continued existence remains secure. However, should the NLRB or the Courts take the narrow Yeshiva approach, then challenges to faculty senates as violative of Sections 2(5) and 8(a)(2) of the Act may occur.

Other EIS issues vis-a-vis faculty senates and professional employee organizations encompass Section 8(a)(1) and Section 9(a). Section 8(a)(1) extends to employees rights guaranteed under Section 7 of the Act - among these is the right to organize. Does the existence of consultative bodies and committees constitute unlawful interference to prevent the exercise of this right? Section 9(a) confers upon the certified agent exclusive rights as the bargaining agent to negotiate the terms and conditions of employment. If an EIS committee meets to discuss topics that are related to, or are part of the terms and conditions of employment, has the employer violated the meaning and the spirit of Section 9(a)? Moreover, if professional employees and managers or administrators meet in a cooperative team setting and discuss or resolve matters that may potentially impact on the terms and conditions of employment, do they not run the risk of intruding on the "exclusivity doctrine"?

THE YESHIVA QUANDARY

The Electromation and DuPont decisions are viewed by some academic unionists as a window of opportunity to suppress the impact of NLRB v. Yeshiva University while at the same time permitting them to be an integral part of the labor law reform movement. Until Yeshiva, private sector faculties were able to retain union representation and fully participate in institutional governance. Proponents of higher education collective bargaining have sought the legislative and/or judicial reversal of Yeshiva, however; most academic unionists admit that the Yeshiva litigation battle has been lost.[18] Unions have been unsuccessful in limiting the proliferation of Yeshiva claims in private sector colleges and universities and are now seizing upon the EIS debate in an attempt to legislatively limit its influence. Neither the Courts nor the NLRB has given any indication of a reversal in labor's favor.

The restriction against managers and supervisors collectively bargaining pursuant to the Act is not a new issue, and does not necessarily reflect a reversal of law.[19] The prerequisites are rooted in private sector labor law and while academics may claim that the interpretation is fresh, managerial employees have never enjoyed the protection of the NLRA. Supervisory employees have been statutorily excluded from coverage of the Act since the enactment of Taft-Hartley Amendments.[20] Yeshiva did not alter the rights of managers and supervisors but found faculty within those groups. It would appear that academic unionists should not seek the end of these exclusions but instead concentrate their efforts on ensuring that faculty are not deemed managerial or supervisory, based on their participation in institutional governance.

RECOMMENDATIONS AND CONCLUSIONS

Is there a way in which to remove legal obstacles to employee involvement schemes to allow them to expand while at the same time ensuring the continuation of existing statutory protection of representation and bargaining rights for professional employees?[21] In an attempt to legislatively avoid the Electromation and DuPont entanglements, and furthermore to remove the legal barriers created by Yeshiva and Health Care, several alternatives applicable to college faculty and other professional employees are set forth. Based in part on the Dunlop report, meetings with the American Association of University Professors (hereinafter "AAUP"), and the author's own research these suggestions are set forth as a means of exiting the quagmire of EIS and the bargaining rights professional employees.[22]

The Dunlop Commission report favors the extension of EIS but cautions certain legal impediments and "rigid distinctions" set forth in Yeshiva and Health Care & Retirement Corp. must first be resolved to ensure the continued right to representation. Central to the Commission report is that workers do not lose collective bargaining protections and rights, "... by taking on supervisory and managerial responsibilities." Actual supervisors or managers as defined in pre-Yeshiva case law should continue to be excluded from the statutory right to bargain; however, the Commission noted that the enlargement of the scope of supervisory and managerial exclusions has caused many individuals who desire to bargain to lose these rights. They recommend that the NLRA be clarified and that NLRB:

> insure nonunion employee participation programs are not found to be unlawful simply because they involve discussion of "terms and conditions" of work or compensation as long as such discussion is incidental to the broad purposes of these programs. (Dunlop)

Regarding the managerial and supervisory issue the Commission recommends that the definition of supervisory and managers be updated to:

> insure that only those with full supervisory or managerial authority and responsibility are

> excluded from coverage of the law. We further recommend that no individual or group of individuals should be excluded from coverage under the statute because of participation in joint problem-solving teams, self-managing work groups, or internal self-governance or dispute resolution processes. (Dunlop)

The Commission urges a new managerial employee definition, one that would protect the bargaining rights of:

> (1) members of work teams and joint committees to whom managerial and/or personnel decision-making authority is delegated, or
>
> (2) professionals and paraprofessionals who direct their less skilled coworkers. (Dunlop)

The Commission noted that by extending the definition of supervisor as suggested in Health Care to "any employee who responsibly directs coworkers" could adversely affect professionals in particular.[23]

One consideration in the following AAUP recommendation is the apprehension raised by some academic unionists regarding the extension of supervisory and managerial classifications to other professional employees. These suggestions and amendments are not limited to faculty as they address the broader issue of representation rights for professional employees and the possible extension of supervisory and managerial classifications to them.[24]

I. Passage of a Separate Bill to Regulate Bargaining by Faculty and Other Professional Employees

The enactment of a separate national collective bargaining bill for private sector college faculty and other "professional employees" would alleviate the Yeshiva and Health Care questions and address the concerns of employee participation. Although Section 2(12) of the NLRA recognizes the right of "professional employees" to bargain; a separate bill would necessitate a reassessment of faculty collective bargaining rights. The current interpretation of Yeshiva pushes academic "professional employees" into management.

II. Amend Section 2(11) of the NLRA to Eliminate the Supervisory/Managerial Exemption for College Faculty and other Professional Employees

Amending the NLRA to guarantee the right of representation to faculty employees under the Act is a method of legislatively obliterating Yeshiva. The American Association of University Professors (AAUP) proposed bill states:

> that no faculty member or group of faculty members in any educational institution shall be deemed to be managerial or supervisory employed solely because the faculty member or group of faculty members participates in decisions with respect to courses, curriculum, personnel, budget, or other matters of educational policy. (AAUP)

Under this approach faculty would be free to partake in institutional governance without fear of losing their rights to representation provided under the Act. This amendment is confined to college faculty; however, it can be extended to include other professional employees. Although the proposal has limited application beyond the academic community, its restrictiveness might result in minimal opposition since its impact would be confined. Similar language could be included to prevent a loss of bargaining rights by other professional employees.

III. Amend Section 2(12) of the NLRA to eliminate Supervisory and Managerial Exclusion for Higher Education Professional Employees -- Quantitative

This amendment assumes a quantitative approach and is based on the understanding that there is a sufficient body of case law to make these determinations. The Equal Employment Opportunity Commission and the Fair Labor Standards Act relies on a 40 percent formula to exempt certain executives and administrators from overtime eligibility. Similar formulas could be negotiated regarding college faculty.

> a professional employee, as defined in paragraph "a" of Section 2(12), employed by any institution of higher education shall not be deemed a managerial employee or a supervisor unless the employee devotes the majority of time as a managerial employee, a supervisor or both. (AAUP)

IV. Amend Section 2(11) or 2(12) of the NLRA to Eliminate Supervisory and Managerial Exclusion for Higher Education Professional Employees -- Combination Descriptive and Quantitative

The AAUP has proposed amendments to Section 2(11)(12) of the Act that are either descriptive or

quantitative. Job functions are specified, while in the latter a method is advanced under which supervisory and/or managerial duties are divided between faculty seeking bargaining rights and actual supervisors or managers. This recommendation would combine the descriptive and quantified approach and could serve as an amendment to either Section 2(11) or (12) of the Act and would alleviate the Yeshiva concern

> except that no professional employee or group of professional employees in any institution of higher education shall be deemed to be managerial or supervisory employees solely because the professional employee or group of professional employees participates in collegial decision with respect to courses, curriculum, personnel, budget or other matters of institutional policy; or engages in supervisory and/or managerial activities unless such activities constitute the majority of the time. (AAUP)

V. Expand Section 2(3) - definition of "employee"

Another potential change in the Act provides for enlarging the definition of "employee" under Section 2(3). This recommendation, advocated by some faculty unionists, would redefine and recognize the concept of the "collective exercise of expert judgment" to preclude a finding of managerial status based on a faculty member's exercise of collective professional judgment.

VI. Redefine Section 2(5) definition of "labor organization"

By redefining a "labor organization" and distinguishing between those that do or do not bargain collectively, or show any inclination to do so, the "sham union" problem would be removed. Nonbargaining organizations such as faculty senates would not be viewed as a threat to existing labor organizations and would be prohibited from negotiating terms and conditions of employment. Should workers seek a more traditional form of representation they would be free to organize under the Act. If subsequent unionization occurs then EIS committees would be eliminated.

VII. Removing Section 8(a)(2)

This proposal would eliminate the restriction against company unions but would leave in place other employee rights. Concerns have been raised by unions that this solution, while enabling the formulation of EIS and the continued existence of faculty senates, might allow employers to revert to earlier tactics of creating "sham unions." They have suggested that the removal of 8(a)(2) is an employer goal, is motivated by the management bar to return to the pre-NLRA, and is designed to create sham unions. This strategy would allow corporate America to create legitimate EIS and develop other collaborative models, yet incurs the risk of alienating organized labor so that its passage becomes problematic. Under this model, the challenge to faculty senates appears minimal.

VIII. Amend the NLRA to Permit EIS at Nonunionized Firms

By allowing collective participation at nonunionized colleges and firms, employers will be able to gain the advantage of EIS without violating the NLRA. In this plan opposition from labor would be minimal unless a valid organizing drive was contemplated or underway. Should unions subsequently gain representation rights in the workplace, then the present Section 8(a)(2) prohibitions would apply.

IX. Repeal the NLRA

Considered to be the most drastic of the reform proposals there is some support for this suggestion from both labor and management. Unionists argue that the present regulatory framework contained in the Act is so cumbersome to make it worthless. The elimination of the Act is compatible with deregulation and the free trade movement and would allow the economics of the marketplace to control. Existing wage and hours' laws, as well as safety and security legislation, would remain and constitute the regulatory elements of the employment relationship. Employers would be free to create EIS or any such other group while unions could freely organize managerial and supervisory employees.

Additionally the recently proposed "Teamwork for Employees and Managers Act of 1995" (TEAM) addresses EIS and if enacted would amend the NLRA by providing for the establishment of "legitimate Employee Involvement programs, in which workers may discuss issues involving terms and conditions of employment, to continue to evolve and proliferate."[25]

Faculty unions and professional employees are attempting to broaden their coalitions and seek the assistance of other groups to bring the representation question before a larger body. In an attempt to become part of the debate they sought input and leadership from other unions; however, the goals of "big labor" did not appear to accommodate those of academic unionists. Although at first impression linkage between Yeshiva, Health Care, Electromation, and DuPont might not be

apparent, it is the contention of the author that these decisions are corresponding and accordingly the representation question now extends beyond collective bargaining in higher education. The aforementioned decisions could be construed as forbidding participatory management and increased labor-management co-operation. The task before faculty and professional employees unions is to design a legislative framework that would permit employee involvement while at the same time insure continued statutory representation rights. The question remains whether statutory authority permitting EIS and a redefining the role of the employee would be sufficient to create a new model of labor management cooperation.

ENDNOTES

1. Selected portions of this paper were published in Labor Law Journal, Volume 46, No. 2, February 1995, pps. 116-124. This complete paper was published by the American Bar Association. Reprinted by permission of the Labor Law Journal, published and copyrighted by CCH INCORPORATED, 2700 Lake Cook Road, Riverwoods, IL, 60015 and copyright © the American Bar Association, "An Investigation of Employee Involvement Schemes and Governance Structures in Professional Employment," by Joel M. Douglas, ABA Section of Labor and Employment Law 1995 Annual Meeting.

2. Professor Douglas is a member of the faculty of the School of Public Affairs at Baruch College of the City University of New York. In addition to his professorial appointment in the School of Public Affairs, Dr. Douglas served as Director of the National Center for the Study of Collective Bargaining in Higher Education and the Professions from 1978 - 1992.

3. See for example, NLRB v. Yeshiva University, 444 U.S. 672 (1980) in which the United States Supreme Court found faculty at that institution to be managerial employees and not entitled to bargain under statutory protection. Although faculty unions are free to organize and bargain collectively in the private sector, unless they can pass the Yeshiva test, they can no longer do so under NLRA protection.

4. "Commission on the Future of Worker-Management Relations (Federal Advisory Committee Act PL 92-463)." In its "Mission Statement" the Commission addressed the following questions: 1. What (if any) new methods or institutions should be encouraged or required, to enhance work-place productivity through labor management cooperation and employee participation? 2. What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay? 3. What (if anything) should be done to increase the extent to which work place problems are directly resolved by the parties themselves, rather than through recourse to state and federal court and government regulatory bodies? (Mission Statement - Commission, 1992).

5. Electromation Inc. and Teamsters Local 1049, AFL-CIO, 309 NLRB 163 (1992).

6. E.I. Dupont de Nemours & Company and Chemical Workers Association, Inc., International Brotherhood of Dupont Workers, 311 NLRB 88 (1993).

7. National Labor Relations Act, P.L. 198, el Congress (1935).

8. Electromation Inc. v. NLRB and Teamsters Local 364, CA-7, 92-4129.

9. See, NLRB v. Health Care & Retirement Corp. of America, 114 S.Ct.1778 (1994) in which the Supreme Court expanded the definition of supervisory employee.

10. Section 2(12) of the Act defines professional employees as "any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, mechanical or physical work; (ii) involving the consistent exercise of discretion and judgement in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of study of specialized intellectual instruction and study in an institution of higher learning or a hospital, and distinguished from a general academic education or from an apprenticeship or from training in the performance or routine mental, manual, or physical processes; ..."

11. With over one third of the professorate represented by certified bargaining agents and approximately 1,000 campuses organized, this paradigm is firmly in place and can serve as an experimental laboratory for employee involvement within a unionized setting. See, Annunziato, Frank R., "Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education," Volume 21, NCSCBHEP, Baruch College, CUNY, January 1995, 182 pp.

12. NLRB v. Northeastern University, 601 F.2d 1209, (1st Cir. 1979).

13. Duquesne University, 198 NLRB 891 (1972).

14. 309 NLRB 163.

15. NLRB v. Cabot Carbon Co., 360 US 203 (1959).

16. These tests are reminiscent of early Yeshiva guidelines where the Courts and the Board attempted to quantify the frequency of management's acceptance of faculty decisions as an indicator of faculty authority. The prevailing theory was that the greater the degree of consensus between faculty resolutions and management's acceptance thereof, the higher percentage of faculty involvement in the management process and therefore the increased likelihood of successful Yeshiva claim. This premise fails to acknowledge that in many institutions faculty recommendations, including those of faculty senates, are routinely rejected until ones are made that are ultimately accepted and sanctioned by management.

17. Datz, Harold, J., 1993. "Analysis of NLRB's Electromation Ruling," pps. 1-4.

18. Approximately 75 colleges and universities have used the Yeshiva defense to either submit unit clarification petitions or have outwardly refused to bargain with certified unions. See, Douglas, Joel M., "Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education," Volume 18, NCSCBHEP, Baruch College, CUNY, January, 1992.

19. The supervisory status of college and university faculty was first addressed in Boston University 1-CA-11061 NLRB (1984).

20. Labor Management Relations Act (Taft-Hartley Act) 61 Stat. 156 (1947).

21. One recent legislative proposal is the "Worker-Management Relations for the 21st Century Act of 1994" which would amend Section 8(a)(2) for the Act and provide for cooperative measures and "provide an avenue for workers and management to join together to create a more productive work environment." These committees would contain an equal number of managers and workers with employees electing their own representatives. This bill, while of possible interest to industrial America, does not however address the immediate concerns of the higher education labor relations community and other professional employees. See United States Senate Bill# SB 2499.

22. The selected passages from the Dunlop Commission Report are contained in Section II. "Employee Involvement" of the: "Recommendations of the Commission on the future of Worker-Management Relations," Washington D.C., 1995.

23. The Commission noted that Judge Richard Posner has pointed out, -- most professionals have some supervisory responsibilities in the sense of directing another's work ■ the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aide, and so on. NLRB v. Res-Care, Inc., 705 F.2d 1461, 1465 (7th Cir. 1983).

24. Recommendations #1 - were based on discussion between the author and members of the American Association of University Professors (AAUP) collective bargaining staff.

25. See H.R. 743 "Teamwork for Employees and Managers Act of 1995." Section 3 of the Act proposes amending Section 8(a)(2) of the NLRA by inserting the following:

> That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity or any kind, in which employees participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements before the employer and any labor organization.

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